408B

Nos. 05-908 & 05-915

Supreme Court, U.S.
FILED
AUG 17 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of Joshua Ryan McDonald,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE NINTH AND SIXTH CIRCUIT, RESPECTIVELY

BRIEF *AMICI CURIAE* OF THE PROJECT ON FAIR REPRESENTATION, NATIONAL ASSOCIATION OF SCHOLARS, AND LAW PROFESSORS IN SUPPORT OF PETITIONERS

BERT W. REIN
Counsel of Record
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amici Curiae

August 17, 2006

202868

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE FOURTEENTH AMENDMENT DOES NOT ADMIT OF CLASSIFICATIONS ON THE BASIS OF RACE 5

A. The Equal Protection Clause Is Color-Blind 5

B. *Grutter* Wrongly Enshrined Racial Balancing As A Compelling Government Interest 14

II. *GRUTTER* IS NOT SETTLED LAW AND SHOULD BE OVERRULED 23

CONCLUSION 30

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Ableman v. Booth,
62 U.S. (21 How.) 506 (1858) 6

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) ..... *passim*

Akins v. Texas,
325 U.S. 398 (1945) 12

Arizona v. Rumsey,
467 U.S. 203 (1984) 24

Bell v. Maryland,
378 U.S. 226 (1964) 6, 7

Bolling v. Sharpe,
347 U.S. 497 (1954) 11

Brown v. Board of Education,
347 U.S. 483 (1954) ..... *passim*

Burnet v. Coronado Oil & Gas Co.,
285 U.S. 393 (1932) 23

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) ..... *passim*

Comfort v. Lynn School Committee,
418 F.3d 1 (1st Cir. 2005),
cert. denied, 126 S. Ct. 798 (2005) 4, 19

Cited Authorities

Page

DeFunis v. Odegaard,
416 U.S. 312 (1974) 14

Dred Scott v. Sandford,
60 U.S. (19 How.) 393 (1856) 2, 6, 7, 11

Freeman v. Pitts,
503 U.S. 467 (1992) 16

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 24

Gratz v. Bollinger,
539 U.S. 244 (2003) 13-14, 19, 28

Grutter v. Bollinger,
539 U.S. 306 (2003) ..... *passim*

Helvering v. Hallock,
309 U.S. 106 (1940) 4, 24, 29

Hirabayashi v. United States,
320 U.S. 81 (1943) 15

Johnson v. California,
543 U.S. 499 (2005) 4, 26

Lawrence v. Texas,
539 U.S. 558 (2003) 26, 27

League of United Latin American Citizens v. Perry,
__ U.S. __, 126 S. Ct. 2594 (2006) 2

Cited Authorities

Page

Lomack v. City of Newark,
No. 04-6085, 2005 WL 2077479
(D.N.J. Aug. 25, 2005) 28-29

Lovett v. United States,
66 F. Supp. 142 (Ct. Cl. 1945),
aff'd, 328 U.S. 303 (1946) 5

Loving v. Virginia,
388 U.S. 1 (1967) 12

Marbury v. Madison,
5 U.S. (1 Cranch.) 137 (1803) 22

McDonald v. Santa Fe Trail Transportation Co.,
427 U.S. 273 (1976) 8

McFarland v. Jefferson County Public Schools,
330 F. Supp. 2d 834 (W.D. Ky. 2004),
aff'd, 416 F.3d 513 (6th Cir. 2005),
cert. granted, 126 S. Ct. 2351 (2006) 20

Metro Broadcasting, Inc. v. FCC,
497 U.S. 547 (1990), *overruled by*
515 U.S. 200 ..... *passim*

Missouri v. Jenkins,
515 U.S. 70 (1995) 11, 13, 16

Ohio Forestry Ass'n v. Sierra Club,
523 U.S. 726 (1998) 20

Palmore v. Sidoti,
466 U.S. 429 (1984) 12, 17

Cited Authorities

Page

Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006) 18, 20

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 26

Payne v. Tennessee, 501 U.S. 808 (1991) 23, 29

Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2003) 28

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 4, 23, 24, 27

Plessy v. Ferguson, 163 U.S. 537 (1896) 3, 10, 11, 21, 22

Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) 6

Regents of University of California v. Bakke, 438 U.S. 265 (1978) ..... *passim*

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 8

Shaw v. Reno, 509 U.S. 630 (1993) 12

Cited Authorities

Page

Smith v. Allwright,
321 U.S. 649 (1944) 4, 23

South Carolina v. Gathers,
490 U.S. 805 (1989),
overruled by 501 U.S. 808 (1991) 23, 27

Swann v. Charlotte-Mecklenburg Board of Education,
402 U.S. 1 (1971) 12

Swift & Co. v. Wickham,
382 U.S. 111 (1965) 27

Turner v. Safley,
482 U.S. 78 (1987) 26

United States v. Jefferson County Board of Education,
372 F.2d 836 (5th Cir. 1966), *aff'd* en banc,
380 F.2d 385 (5th Cir. 1967) 11

Wessmann v. Gittens,
160 F.3d 790 (1st Cir. 1998) 19

Wygant v. Jackson Board of Education,
476 U.S. 267 (1986) 15, 17

Cited Authorities

Page

STATE CASES

Hi-Voltage Wire Works, Inc. v. City of San Jose,
12 P.3d 1068 (Cal. 2000) 7, 10

Lehew v. Brummell,
15 S.W. 765 (Mo. 1891) 9

Massachusetts v. Aves,
35 Mass. (18 Pick.) 193 (1836) 5

People ex rel. King v. Gallagher,
93 N.Y. 438 (1883) 9

Price v. Civil Service Commission,
604 P.2d 1365 (Cal. 1980) 14, 30

Ward v. Flood,
48 Cal. 36 (1874) 9

UNITED STATES CONSTITUTION

U.S. Const. art. I, § 2, cl. 3 ..... 2, 6

U.S. Const. art. IV, § 2, cl. 3 6

U.S. Const. amend. XIII 8

U.S. Const. amend. XIV, § 1 ..... 2-3, 8

U.S. Const. amend. XV 8

Cited Authorities

Page

CONGRESSIONAL MATERIALS

2 Cong. Rec. 4083 (1874) 9

3 Cong. Rec. 945 (1875) 8

Congressional Globe, 42nd Congress, 2d Sess. 3193 (1872) 8-9

SECONDARY SOURCES

Abraham Lincoln, Gettysburg Address (1863) 7

Alan M. Dershowitz & Laura Hanft, Affirmative Action and the Harvard College *Diversity-Discretion Model: Paradigm or Pretext?*, 1 Cardozo L. Rev. 379 (1979) 17

Alexander M. Bickel, *The Morality of Consent* (1975) 14

Charles Fried, Op-Ed., *Courting Confusion*, N.Y. Times, Oct. 21, 2004 28

Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401 (1988) 23

Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 Tex. Rev. L. & Pol. 63 (2004) 28

Cited Authorities

Page

Donald G. Neiman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 Cardozo L. Rev. 2115 (1996) 5

James Madison, Address Before the Constitutional Convention (June 6, 1787), *in* 1 *The Records of the Federal Convention of 1781* (Max Farrand ed., Yale Univ. Press 1911) 6

Jeff Jacoby, *We're Still Counting By Race 100 Years After Plessy*, New Orleans Times Picayune, Apr. 27, 1996 22

John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13 (1992) 11

Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341 (1949) 9

K.G. Jan Pillai, *The Defacing Reconstruction of Powellian Diversity*, 31 T. Marshall L. Rev. 1 (2005) 28

Michael Novak, *Another New Birth of Freedom: From Lincoln to Bush*, 72 Tenn. L. Rev. 813 (2005) ... 7

Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995 (2003) 7

Cited Authorities

Page

Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995) 9, 11

Thomas Jefferson, *Notes on the State of Virginia* (Merrill D. Peterson ed., Library of America 1984) (1871-72) 6

William H. Rehnquist, *The Notion of the Living Constitution*, 29 Harv. J.L. & Pub. Pol'y 401 (2006) 7

William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949) 23

INTEREST OF *AMICI CURIAE* [1]

The Project on Fair Representation at the American Enterprise Institute is a public interest organization dedicated to the promotion of color-blind equal opportunity and racial harmony. The Project works to advance race-neutral principles in the areas of education, public contracting, public employment, and voting.

The National Association of Scholars ("NAS") is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States. NAS has more than 4,300 members and associates, and includes within its ranks some of the nation's most distinguished and respected scholars in a wide range of academic disciplines. The purpose of NAS, among other things, is to encourage, foster, and support rational and open discourse as the foundation of academic life, and to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education. NAS thus works to advance race-neutral principles in education.

Amici Law Professors seek to promote learning in an academic environment free from the racial discrimination. *Amici* are committed to the principles of equality that underlie our system of government and therefore oppose racial classifications of any kind.[2]

Amici have a direct interest in this case. *Amici* oppose racial preferences in student admissions and assignment because they

---

[1] The parties have filed letters with the Court consenting to all *amicus* briefs. No counsel for a party has written this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A list of the *amici* professors and their academic affiliations is provided as an appendix to this brief. The views expressed in this brief are those of the individual professors and do not necessarily reflect the views of the schools at which they teach.

believe that such preferences are contrary to the principles to which *amici* are dedicated and to the American ideal of individual equality to which *amici* are profoundly committed. For these reasons, *amici* respectfully submit this brief in support of Petitioners and urge the Court to reverse the judgments below.

SUMMARY OF ARGUMENT

The Court has asked whether *Grutter v. Bollinger*, 539 U.S. 306 (2003), should be overruled. The answer is yes. *Grutter* is inconsistent with the text and history of the Fourteenth Amendment, misapplies longstanding precedent, and gives sanction to racial balancing under the guise of viewpoint diversity. No countervailing principle of stare decisis offers a satisfactory basis for retaining this recent and thoroughly misguided decision. Indeed, "[i]t is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, __ U.S. __, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, dissenting in part).

The Declaration of Independence announced that "all men are created equal" and thereby pledged our unrelenting commitment to the principle of individual equality. The Founders understood that equal treatment under the law is an indispensable component of republican governance. They nevertheless sacrificed this principle to forge a Union among the thirteen Colonies. *See, e.g.*, U.S. Const. art. I, § 2, cl. 3. The judiciary later assisted in sustaining the institution of slavery and eliminated any remaining chance to resolve the question short of armed conflict. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). The Civil War thus was a result of our failure to deliver on the Declaration's promise of equality for all.

The Reconstruction Amendments were a prize of this bloody war. The Framers of the Fourteenth Amendment recognized the genesis of the Civil War and drafted the Equal Protection Clause in terms sweeping enough to permanently ensure individual equality: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.

Const. amend. XIV, § 1. The Equal Protection Clause, by its terms, does not admit of state-administered racial classifications that inevitably protect some at the expense of others.

The Framers' expectations were quickly dashed as the courts read the guarantee of equality out of the Fourteenth Amendment in the service of Jim Crow. *See Plessy v. Ferguson*, 163 U.S. 537 (1896). Only the first Justice Harlan stood against the tide of government-sanctioned segregation. In dissent, he captured the true meaning of the Equal Protection Clause in one sentence: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting). Justice Harlan too understood that the concept of equal protection banned racial classifications without exception.

It took nearly fifty years for Justice Harlan's vision of a color-blind Equal Protection Clause to become law. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The result in *Brown* rejected the rule of *Plessy*, gave life to the Declaration's promise of equality, and charted a return to a color-blind Fourteenth Amendment. After *Brown*, only remedying de jure discrimination, and perhaps the existence of a national emergency, would permit government-endorsed classifications on the basis of race. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). Indeed, the rule that the individual right to equal protection forbade racial balancing was thought to be settled. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (Powell, J.).

Grutter undid a half-century's march toward racial neutrality by resurrecting quotas under the guise of diversity. *See Grutter*, 539 U.S. at 329-30. As the dissenters explained, whatever one thinks of true diversity, the University of Michigan simply had no compelling interest in pursuing this goal. *See id.* at 388-89 (Kennedy, J., dissenting). For public schools that use race in the decision-making process, race is not only the predominant factor—it is the only factor. Worse still, by erasing the distinction between diversity and quotas, *Grutter* conferred

legitimacy on blatant racial classifications that should have been rejected long ago. *See, e.g., Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) ("The only relevant criterion . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest.").

Stare decisis is not a barrier to overturning *Grutter*. The Court's paramount obligation, especially in constitutional cases, is to reach the legally correct result. *See Smith v. Allwright*, 321 U.S. 649, 665 (1944). The legally correct result here is beyond peradventure. Nonetheless, the Court often will look beyond the merits to institutional considerations before overturning a wrongly decided case. These considerations include, among others, whether the decision is out of step with established precedent, whether it produced significant reliance, or whether it has proven unworkable. *See Planned Parenthood v. Casey*, 505 U.S. 833 (1992). All of these considerations counsel in favor of overturning *Grutter*.

Grutter is an outlier decision that is out of step with an established body of equal protection jurisprudence. *See Helvering v. Hallock*, 309 U.S. 106, 119 (1940). In particular, the Court's refusal to apply strict scrutiny plainly is inconsistent with longstanding precedent. *See Adarand*, 515 U.S. at 235-36. Indeed, the Court's unprecedented deference to the University under the guise of First Amendment academic freedom is fundamentally inconsistent with the entire premise of strict scrutiny. *See Johnson v. California*, 543 U.S. 499 (2005).

Grutter also did not engender reliance of sufficient weight to overcome its infidelity to the Constitution. Recent decisions are far less likely to produce reliance interests of any significance. *See Adarand*, 515 U.S. at 232-33. And government-mandated racial classifications, which are time-limited under even the most forgiving view, are particularly unlikely to do so. *See Grutter*, 539 U.S. at 342. Last, by confusing the distinction between quotas and genuine diversity, *Grutter* produced an unworkable system that denies the lower courts any legitimate

basis for distinguishing between the various affirmative action programs according to neutral principles of law. *Grutter* should be overruled.

ARGUMENT

I. THE FOURTEENTH AMENDMENT DOES NOT ADMIT OF CLASSIFICATIONS ON THE BASIS OF RACE.

A. The Equal Protection Clause Is Color-Blind.

The Declaration of Independence is the moral foundation from which the Fourteenth Amendment ultimately emerged. The Declaration boldly announced the "self-evident" truth "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." The Declaration of Independence (U.S. 1776); *see also Lovett v. United States*, 66 F. Supp. 142, 149-50 (Ct. Cl. 1945) (Jones, J., concurring) ("The principle of equality was written in the Declaration of Independence before we had a constitution. It was the result of a long struggle of English peoples upward toward the plains of liberty. It is one of our proudest traditions."), *aff'd*, 328 U.S. 303 (1946). The Declaration thus pledged our enduring commitment to the principle of individual equality.[3]

---

[3] The Massachusetts Declaration of Rights, enacted in 1780, similarly announced that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights," which are, "the right of enjoying and defending their lives and liberties, that of acquiring, possessing, and protecting property." Declaration of Rights (Mass. 1780). As the Massachusetts Supreme Court explained, "[i]t would be difficult to select words more precisely adapted to the abolition of negro slavery." *Massachusetts v. Aves*, 35 Mass. (18 Pick.) 193, 210 (1836); *see also* Donald G. Neiman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 Cardozo L. Rev. 2115, 2119 (1996) ("The principles of republicanism and the ideas expressed in the Declaration of Independence were the animating principles of American constitutionalism that entitled all citizens to equal rights regardless of race.").

This promise of equality for all, unfortunately, was not immediately realized. Operating under the belief that a lasting Union was not otherwise attainable, the Founders allowed the evil of slavery to persist. *See, e.g.*, U.S. Const. art. I, § 2, cl. 3 (three-fifths clause); *id.* art. IV, § 2, cl. 3 (fugitive slave clause). That is, although the American Revolution freed us from British rule, the "Constitution of the new Nation, while heralding liberty, in effect declared all men to be free and equal—except black men who were to be neither free nor equal." *Bell v. Maryland*, 378 U.S. 226, 286 (1964) (Goldberg, J., concurring); *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, J.) ("Our Nation was founded on the principle that 'all Men are created equal.' Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery.").[4]

The judiciary assisted in further entrenching the institution of slavery. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (ruling that African-Americans were ineligible for citizenship); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858) (holding the Fugitive Slave Act of 1850 constitutional); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (holding state law prohibiting forcible return of escaped slaves

---

[4] It would be wrong, however, to suggest that the immorality of slavery was lost on the Founders. *See, e.g.*, Thomas Jefferson, *Notes on the State of Virginia*, 288-89 (Merrill D. Peterson ed., Library of America 1984) (1871-72) ("And with what execration should the statesman be loaded, who, permitting one half the citizens thus to trample on the rights of the other, transforms those into despots, and these into enemies, destroys the morals of the one part, and the *amor patriae* of the other. . . . Indeed [I] tremble for my country when I reflect that God is just; that his justice cannot sleep for ever."); James Madison, Address Before the Constitutional Convention (June 6, 1787), *in* 1 *The Records of the Federal Convention of 1781*, at 135 (Max Farrand ed., Yale Univ. Press 1911) ("We have seen the mere distinction of colour made in the most enlightened period of time, a ground of the most oppressive dominion ever exercised by man over man.").

unconstitutional). The Court thus extinguished any remaining opportunity for a peaceful resolution through democratic means. *See* William H. Rehnquist, *The Notion of the Living Constitution*, 29 Harv. J.L. & Pub. Pol'y 401, 410 (2006) ("The Court in *Dred Scott* decided that all of the agitation and debate in Congress over the Missouri Compromise in 1820, over the Wilmot Proviso a generation later, and over the Kansas-Nebraska Act in 1854 had amounted to absolutely nothing.").[5]

The Civil War thus was the sad consequence of our failure to heed the Declaration of Independence in the first instance. *See* A. Lincoln, Gettysburg Address (1863) ("Fourscore and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure."); *Bell*, 378 U.S. at 286 (Goldberg, J., concurring) (explaining that the acceptance of slavery "reflected a fundamental departure from the American creed, a departure which it took a tragic civil war to set right").[6] Again, the Supreme Court played no small part in provoking this conflagration. *See Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1073 (Cal. 2000) (Brown, J.) ("In legitimating this pernicious concept [of racial inferiority], the [*Dred Scott*] court set the stage not only for the cataclysm of the Civil War but for the contentiousness that continues to this day over government's proper role with respect to race.").

---

[5] *See also* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 1024 (2003) (explaining that "the chief evil consequences of *Dred Scott* were the *entrenchment* and *extension* of slavery, the invalidation of the Missouri Compromise, the resulting evisceration of any possibility of political compromise over the expansion of slavery, and the de facto outlawing of the Republican Party platform").

[6] *See also* Michael Novak, *Another New Birth of Freedom: From Lincoln to Bush*, 72 Tenn. L. Rev. 813, 818 (2005) ("The Declaration by itself did not declare war on slavery. Yet, the principle it established had the eventual extinction of slavery as its unmistakable implication.").

The post-Civil War Amendments to the Constitution—"[p]urchased at the price of immeasurable human suffering," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring)—rekindled the ideal of race neutrality embodied in the Declaration. The abolition of slavery was, to be certain, the most immediate and profound post-war objective. *See* U.S. Const. amend. XIII. However, amending the Constitution to outlaw slavery, *see id.*, and to grant the right of suffrage to former slaves, *see id.* amend. XV, without more, would have been insufficient to meet the grander objective. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 296 (1976) ("[T]he 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves.").

The Fourteenth Amendment therefore announced that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause, by its terms, does not admit to racial classifications of any kind—for any reason. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 96, 110 (1990) (Scalia, J., dissenting) ("[T]he Fourteenth Amendment's requirement of 'equal protection of the laws,' combined with the Thirteenth Amendment's abolition of the institution of black slavery, leaves no room for doubt that laws treating people differently because of their race are invalid.").

Indeed, the Framers of the Reconstruction Amendments viewed their task as restoring the broader principle of individual equality that, as the Declaration explained, underlies the legitimacy of republican governance: "[t]he duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions on any of these grounds, so far as the law is concerned." 3 Cong. Rec. 945 (1875) (Statement of Rep. John Lynch); *see also* Cong. Globe, 42d Cong., 2d Sess.

3193 (1872) (Statement of Sen. John Sherman) (stating that the key to restoring peace in the South was to "[w]ipe out all legal discriminations between white and black"); 2 Cong. Rec. 4083 (1874) (Statement of Sen. Daniel Pratt) (explaining that "free government demands the abolition of all distinctions founded on color and race"). The historical evidence surrounding the framing of the Reconstruction amendments thus confirms the race-neutral command of the Equal Protection Clause.[7]

This Reconstructionist pursuit of race neutrality, however, was short-lived; "[t]he Equal Protection Clause . . . was '[v]irtually strangled in infancy by post-civil-war judicial reactionism.'" *Bakke*, 438 U.S. at 291 (Powell, J.) (quoting Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 381 (1949)). The judiciary repeatedly endorsed the proposition that segregation of public schools was compatible with the Equal Protection Clause. *See, e.g.*, *Ward v. Flood*, 48 Cal. 36, 52 (1874) (ruling that "in the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other"); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 448 (1883) (ruling that the "claim" that "any distinction made by law and founded upon difference of race or color is prohibited by the Constitution . . . leads to startling results and is not believed to be well-founded"); *Lehew v. Brummell*, 15 S.W. 765, 766 (Mo. 1891) (concluding that "the constitution and laws of this state providing for separate schools for colored children are not forbidden by

---

[7] *See also Bakke*, 438 U.S. at 293 (Powell, J.) (explaining that "it is not unlikely that among the Framers were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application"); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 993 (1995) (stating that the Fourteenth Amendment's framers understood it to mean that "legally enforceable civil rights are the same for all . . . persons . . . without distinction on the basis of race [or] color").

or in conflict with the fourteenth amendment of the federal constitution").

The judicial nullification of the Equal Protection Clause was complete with *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Supreme Court—save Justice Harlan—upheld Louisiana's segregation of railroad cars under the rubric of "separate but equal" and thus "validated government-initiated racial restrictions and gave its imprimatur to legally enforced segregation on the theory that '[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.'" *Hi-Voltage Wire Works, Inc.*, 12 P.3d at 1073 (quoting *Plessy*, 163 U.S. at 552). The Court, for good measure, went out of its way to extend its "separate but equal" rationale to the public school context. *See Plessy*, 163 U.S. at 544 (concluding that "the establishment of separate schools for white and colored children . . . [has] been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced").

Standing alone, Justice Harlan articulated the proper meaning of the Equal Protection Clause in simple, eloquent terms that cannot be improved: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting). As he explained, "all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* Moreover, Justice Harlan understood the significance of the Court's decision and presaged the regrettable events of the coming decades. *See id.* (explaining that state-sanctioned racial discrimination was "cunningly devised to defeat legitimate results of the war, under the pretense of recognizing equality of rights" and would "have no other result than to render permanent

peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned").[8]

More than fifty years later, the Supreme Court ultimately vindicated Justice Harlan's vision of a color-blind constitution and restored the natural right to individual equality that the Declaration promised nearly two hundred years before. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954). In a terse rebuke of segregation, the Court unanimously held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Brown*, 347 U.S. at 495; *see also Bolling*, 347 U.S. at 499 ("Classifications based solely upon race . . . are contrary to our traditions and hence constitutionally suspect."); *see also Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("Regardless of the relative quality of the schools, segregation violated the Constitution because the State classified students based on their race.").

As Judge Wisdom later summarized, "*Brown* erased *Dred Scott*, used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men. They are created as equal as are all other American citizens and with the same unalienable rights to life, liberty, and the pursuit of happiness." *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 873 (5th Cir. 1966), *aff'd* en banc, 380 F.2d 385 (5th Cir. 1967); *see also* John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 23-24 (1992) ("The self-evident proposition enshrined in the Declaration—the proposition that all men are created equal—is not merely an aspect of social policy that judges are free to accept or reject; it is a matter of

---

[8] *See also* McConnell, 81 Va. L. Rev. at 954-55 (explaining that "*Plessy v. Ferguson*, far from being an accurate reflection of the original understanding [of the Fourteenth Amendment], adopted a position more extreme than even most opponents of civil rights could maintain in the early 1870s").

principle that is so firmly grounded in the 'traditions of our people' that it is properly viewed as a component of the liberty protected by the Fifth Amendment.").

Until *Grutter v. Bollinger*, 539 U.S. 306 (2003), the understanding that the Fourteenth Amendment created an individual right to be free from racial classifications was—if not universally adopted—surely on the march. *See Akins v. Texas*, 325 U.S. 398, 410 (1945) ("[W]e of this nation are one people undivided in ability or freedom by differences in race, color or creed."); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("Over the years, this Court has consistently repudiated distinctions between citizens solely because of their ancestry as being odious to a free people whose institutions are founded upon the doctrine of equality." (citation and internal quotations omitted)); *Bakke*, 438 U.S. at 289-90 (Powell, J.) ("The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." (footnote omitted)); *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (The Fourteenth Amendment's "central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. Laws that explicitly distinguish between individuals on racial grounds fall within the core of that prohibition." (citation omitted)); *Adarand*, 515 U.S. at 230 ("[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.").[9]

---

[9] Early post-*Brown* decisions that failed to adhere to the color-blind approach almost universally dealt with the remedial measures designed to undo de jure racial discrimination—a unique Fourteenth Amendment injury. *See, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("The objective today remains to eliminate

(Cont'd)

These decisions unquestionably stemmed from the principle that "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring); *see also Metro Broad., Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting), *overruled by Adarand*, 515 U.S. at 227 (explaining that this is a "Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens."). The program validated in *Grutter*, as well as the secondary school assignment plans at issue here, renounce this moral imperative.

The Court should reject the misbegotten, race-conscious model endorsed in *Grutter* and give effect to the true meaning of the Equal Protection Clause. For that matter, any judicial decision that allows public schools to classify students on the basis of race—including the racial "tiebreaker" at issue here—should be overruled. *See Gratz v. Bollinger*, 539 U.S. 244; 281

(Cont'd)
from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of *Brown II*."); *but see Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) (explaining that *Brown II* has allowed the "federal courts to exercise virtually unlimited equitable powers to remedy this alleged constitutional violation. The exercise of this authority has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm."). And, more recent cases that did not adhere closely to the notion of racial neutrality—except for *Grutter*—have been either undermined or outright overruled. *See infra* Section II.

(2003) (Thomas, J., concurring) ("I would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause."); *DeFunis v. Odegaard*, 416 U.S. 312, 337 (1974) (Douglas, J., dissenting) (explaining that a student "who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner."); *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1390-91 (Cal. 1980) (Mosk, J., dissenting) ("However it is rationalized, a preference to any group constitutes inherent inequality.").

"Our nation gave its word over and over again: it promised in every document of more than two centuries of history that all persons shall be treated Equally." *Price*, 604 P.2d at 1390 (Mosk, J., dissenting). Only by interpreting the Equal Protection Clause as color-blind and rejecting all racial classifications can we fulfill this promise. *See* Alexander M. Bickel, *The Morality of Consent* 133 (1975) ("The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."). Failure to heed this call, as Justice Harlan explained, only serves to "keep alive [the] conflict of races" that any classification on the basis of ancestry necessarily assures.

B. *Grutter* Wrongly Enshrined Racial Balancing As A Compelling Government Interest.

The Court has not struck down—despite the Equal Protection Clause's manifest prohibition—all legislation that takes account of race. At least before *Grutter*, however, the Court had limited the use of race to remedial measures necessary to undo de jure discrimination. *See, e.g., Metro Broad., Inc.*, 497 U.S. at 632 (Kennedy, J., dissenting) (rejecting the "use of racial

classifications by Congress untied to any goal of addressing the effects of past race discrimination"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality opinion) ("We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account."). Simply put: "[m]odern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination." *Metro Broad., Inc.*, 497 U.S. at 612 (O'Connor, J., dissenting).[10]

This limitation is much more than the only interpretation that comports with the text of the Equal Protection Clause and the promise the Declaration of Independence. It is the only interpretation that actually achieves individual equality regardless of race or any other classification. Even if enacted with the best of intentions and thought to be benign, racial classifications and preferences "can be the most divisive of all policies, containing within [them] the potential to destroy confidence in the Constitution and in the idea of equality." *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting); *see also J.A. Croson Co.*, 488 U.S. at 493 (plurality opinion) ("Classifications

---

[10] The Court has recognized that an exigency—such as national security—also qualifies as a compelling government interest. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81 (1943). Justices Thomas and Scalia have argued that such a justification—so long as the classification is narrowly tailored—is the only compelling government interest or "pressing public necessity" that can withstand judicial review. *See Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part, dissenting in part) ("[O]nly those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a pressing public necessity." (internal quotations omitted)); *J.A. Croson Co.*, 488 U.S. at 521 (Scalia, J., concurring) (explaining that "only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embodied in the Fourteenth Amendment" (citation omitted)). Using race in academic admissions as a "plus" or "tiebreaker" certainly is not a pressing public necessity.

based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."). To permit the constitutional endorsement of such classifications, for any reason other than to directly remedy de jure racial discrimination, will ensure that the promise of individual equality forever remains unfulfilled. *See id.* at 495 ("[A] watered-down version of equal protection review effectively assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." (citation and internal quotations omitted)).

While permitting race-conscious remedial measures, this Court, at the same time, has been quite clear that racial balancing is not a compelling government interest and therefore is strictly prohibited. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307 (Powell, J.); *see also Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake."); *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) ("An effort to achieve racial balance . . . is . . . patently unconstitutional." (citation and internal quotations omitted)). Racial balancing does not strive to achieve equality in any real sense. Instead, racial balancing operates on the superficial assumption that people are defined, first and foremost, by the color of their skin. Such a pursuit improperly subjugates individual equality to promote numerical aesthetics. Worse still, it plants a badge of inferiority upon those it purports to help. *See Jenkins*, 515 U.S. at 114 (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.").

At bottom, an interest in racial balancing is nothing more than the imposition of racial quotas. *See, e.g., J.A. Croson Co.*, 488 U.S. at 507 ("[A] 30% quota cannot be said to be narrowly

tailored to any goal, except perhaps outright racial balancing."); *Metro Broad., Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting) ("[T]he Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."); *see also* Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 Cardozo L. Rev. 379, 420-21 (1979) ("To reward some persons for the accident of their race is inevitably to punish others for the accident of theirs."). The Equal Protection Clause is devoid of any value whatsoever if racial balancing is to be permitted.[11]

Grutter claimed to adhere to the ban on racial balancing by endorsing diversity as a compelling government interest instead. *See Grutter*, 539 U.S. at 329-30. Diversity and racial balancing are measurably different concepts. Quotas, as explained above, are designed to achieve numerical balance. Whatever its merit, genuine diversity is a vastly different—and far more nuanced—concept than racial balancing. Genuine diversity "is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students." *Bakke*, 438 U.S. at 315 (Powell, J.). Genuine diversity is not a matter of racial blocs; it does not elevate race over other factors and it is not predicated on meeting an enrollment target from a particular racial or ethnic group. *See id.* at 315 ("Petitioner's

[11] For all these reasons, racial balancing joined a long list of other asserted justifications for racial classifications rejected by the Court. *See, e.g., J.A. Croson Co.*, 488 U.S. at 494 (rejecting racial classifications to promote wider participation by minority business enterprises in the construction of public projects); *Wygant*, 476 U.S. at 274-76 (rejecting discrimination in teacher assignments to provide "role models" for minority students); *Palmore*, 466 U.S. at 433 (rejecting the awarding of child custody to father, after divorced mother entered an interracial remarriage, in order to spare child social "pressures and stresses" due to race).

special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."); *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (explaining that the university must ensure "that race does not become a predominant factor in the admissions decisionmaking").

Grutter obliterated this important distinction. Neither the University of Michigan nor any other school has shown even an inkling of interest in a system of genuine diversity where race is not a predominant factor. For these schools, race is the only factor. As the dissenters ably explained, the University of Michigan's use of race to achieve "critical mass" was simply a euphemism for racial balancing. *See Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used . . . to mask [an] attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."); *id.* at 379 (Rehnquist, C.J., dissenting) ("Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."); *id.* at 346-47 (Scalia, J., concurring in part, dissenting in part) ("[T]he University of Michigan Law School's mystical 'critical mass' justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.").

Thus, in one sense, whether genuine diversity is a compelling government interest is decidedly beside the point. The relevant programs in the instant cases have not even sought to advance such an interest. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1177 (9th Cir. 2005), ("[T]he dissent contends [that] the District may only consider race along with other attributes such as socioeconomic status, ability to speak multiple languages or extracurricular talents. We read *Grutter*, however, to recognize that racial diversity, not some proxy for it, is valuable in and of itself."), *cert. granted*, 126 S. Ct. 2351 (2006); *id.* at 1201 (Bea, J.,

dissenting) (explaining that "[a]t oral argument, the District conceded that it is not asserting the *Grutter* 'diversity' interest"); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 18 (1st Cir. 2005) ("Unlike the *Gratz* and *Grutter* policies, the Lynn Plan is designed to achieve racial diversity rather than viewpoint diversity." (footnote omitted)), *cert. denied*, 126 S. Ct. 798 (2005).[12]

Yet, in another sense, the vindication of the University of Michigan's brand of diversity in *Grutter* is precisely the issue. By erasing the distinction between racial balancing and genuine diversity, *Grutter* has forced the Court to confront secondary school policies that openly and notoriously make race the operative criteria for assignment. This blatant use of race by the government to distinguish between students should have been put to rest some time ago. *Compare Wessmann v. Gittens*, 160 F.3d 790, 799 (1st Cir. 1998) ("The Policy is, at bottom, a mechanism for racial balancing—and placing our imprimatur on racial balancing risks setting a precedent that is both dangerous to our democratic ideals and almost always constitutionally forbidden."), *with Comfort*, 418 F.3d at 18 ("The only relevant criterion . . . is a student's race; individualized consideration beyond that is irrelevant to the compelling interest.").

---

[12] *See also* Terrence J. Pell, *Camouflage for Quotas*, Wash. Post, July 5, 2003, at A5 ("Within hours of the decision, Michigan officials and others made clear they viewed last week's decisions as little more than a fig leaf with which to hide new racial double standards."). The University of Michigan's disguised system of racial balancing remains the common practice of public universities and graduate schools. *See, e.g.*, Tim Grant, *Who Gets In? Admissions Officers Asking Race Question*, Pitt. Post-Gazette, Feb. 15, 2006, at ED7 (discussing the use of race of the University of Pittsburgh); Diane Carroll, *Mining for More Minorities*, Kan. City Star, Aug. 22, 2005, at A1 (discussing race-based admissions at University of Kansas); Kelly Simmons, *UGA: Let Race Count*, Atlanta J. Const., Dec. 2, 2004, at A1 (discussing the University of Georgia's decision to re-introduce race as a factor in admissions in the wake of *Grutter*); Todd Ackerman, *Rice, UT Push Role for Race in Admission*, Hous. Chron., Nov. 25, 2003, at A1 (discussing the University of Texas's and Rice University's respective decisions to adopt admissions policies modeled after the policy upheld in *Grutter*).

Indeed, the secondary school programs before the Court do not even attempt to hide their goal of racial balance. *See, e.g.*, *Parents Involved in Cmty. Schs.*, 426 F.3d at 1169-70 (explaining that "if an oversubscribed high school is racially imbalanced—meaning that the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole—and if the sibling preference does not bring the oversubscribed high school within plus or minus 15 percent of the District's demographics, the race-based tiebreaker is triggered" (internal quotations omitted)); *McFarland v. Jefferson County Pub. Schs.*, 330 F. Supp. 2d 834, 842 (W.D. Ky. 2004) (explaining that "the 2001 Plan requires each school to seek a Black student enrollment of at least 15% and no more than 50%"), *aff'd*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006). These programs, like the program at issue in *Grutter*, constitute "a rigid racial governmental grouping of . . . students for the purpose of attaining racial balance in the schools." *Parents Involved in Cmty. Schs.*, 426 F.3d at 1999 (Bea, J., dissenting).

In sum, an affirmative action program seeking genuine diversity has never been before this Court. Rather, both the law school admissions program before the Court in *Grutter* and the secondary school assignment plans at issue here employ racial classifications in the pursuit of racial balance in the classroom. The Court should reverse *Grutter* and make clear that any attempt to use a supposed diversity interest as a proxy for quotas violates the Equal Protection Clause.[13]

---

[13] The Court need not decide whether genuine diversity is a compelling government interest until the issue is squarely presented. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998) ("The ripeness doctrine reflects a judgment that the disadvantages of a premature review that may prove too abstract or unnecessary ordinarily outweigh the additional costs of—even repetitive—postimplementation litigation."). A theoretical dispute over an issue that has never been before the Court—*i.e.*, the constitutional value of genuine diversity—should not serve as a wedge to divide opinion when agreement is possible on the far more modest question at issue here.

* * *

More than five decades have passed since *Brown* overturned *Plessy* and unmasked the ignobility of state-sanctioned racial classifications. In so doing, the Court fulfilled the promise of the Declaration of Independence and restored the Fourteenth Amendment's guarantee of equal protection. And yet sadly,

> the heart of Jim Crow beats on. The belief that people are first and foremost members of a race is alive and well and living under the rubric 'affirmative action'—or, as we now call it, 'diversity.' Once, affirmative action was seen as a way to promote equal opportunity, to redress generations of discrimination by helping those who had been hurt by it. Today, the goal of affirmative action is racial diversification. . . . But why? When did diversity of skin color become a virtue? Become the virtue? Racial diversity for its own sake is no more or less praiseworthy than racial unity for its own sake. Diversity is a condition, not a state of grace. Sometimes it is good, sometimes bad, usually irrelevant.
>
> . . . .
>
> Only if the most meaningful thing about each of us is our pigmentation can the quotas and preferences of affirmative action—or the segregated railway cars of Jim Crow—make sense. The truth is that few things matter less than our race. Character matters more. Upbringing matters more. Neighborhood matters more. Work habits matter more. Aptitude matters more. Beliefs matter more.
>
> . . . .
>
> The planted axiom, of course, is that all whites speak one way and all blacks speak another—that there is 'white' thinking and 'black' thinking, 'white'

> viewpoints and 'black' viewpoints. However you slice it, the premise of affirmative action is that above all else, we are black or we are white. Know a man's color, and you know how he thinks, how he acts, what he wants, what he is. Achieving diversity is simply a matter of getting the racial numbers right.

Jeff Jacoby, *We're Still Counting By Race 100 Years After Plessy*, New Orleans Times Picayune, Apr. 27, 1996, at B7.

Time and experience have proven that the public schools—secondary and higher education alike—that employ race as a factor in educational decision-making have absolutely no interest in genuine diversity. At every opportunity, public educators seek instead to bring racial balance to the classroom and, in the face of repeated judicial censure, slyly retreat to "plus" systems and racial "tiebreakers" to hide their unconstitutional agenda. These morally dishonest regimes do not serve a compelling government interest under any moniker.

The Equal Protection Clause does not allow racial classifications absent a most compelling public necessity because "[t]he law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). For the Court to continue to allow public schools to get the racial numbers right—in the euphemistic name of diversity—is to reject the fundamental right to equal treatment under the law that the Fourteenth Amendment affords to each individual. *Grutter* should be overruled.

II. *GRUTTER* IS NOT SETTLED LAW AND SHOULD BE OVERRULED.

The foremost obligation of the Supreme Court is to interpret the Constitution in a manner that is faithful to its text. *See Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803) ("It is emphatically the province and duty of the judicial

department to say what the law is.").[14] The law here cannot be questioned. *Grutter* reached an unconstitutional outcome by permitting racial classification under the Equal Protection Clause. *See supra* Section I.A. And, even if the Court accepted racial preferences in the interest of viewpoint diversity, the use of quotas in the pursuit of that interest is plainly unconstitutional. *See supra* Section I.B.

Grutter should be reversed for this reason alone. *See Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (explaining that reversal is required "if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed"); *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."); *Payne*, 501 U.S. at 827 ("[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." (citations and internal quotations omitted)).

The Court often will look, however, beyond de novo fidelity to the Constitution in determining whether to retain a wrongly decided case. *See, e.g., Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (explaining that whether to retain follow or depart from precedent "is a question entirely within the discretion of the court, which is again called

[14] *See also South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) ("I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991); *see also* Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 408 (1988) (arguing that "judges are oath-bound to rule in accordance with the Constitution, not with prior opinions interpreting the Constitution"); William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 736 (1949) ("[A]bove all else . . . it is the Constitution which [the judge] swore to support and defend, not the gloss which his predecessors may have put on it.").

upon to consider a question once decided." (citation and internal quotations omitted)); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (requiring a "special justification" before reversing a wrongly decided case). *Grutter* nevertheless is doomed even if the Court views the reversal of a wrongly decided constitutional decision as a discretionary act.

Although the Court will look to a range of factors in assessing the value of a given decision, incompatibility with longstanding precedent, reliance, and workability consistently are at the forefront of the Court's stare decisis equation. *See, e.g., Adarand*, 515 U.S. at 231-32 (examining whether precedent is out of step with "accepted and established doctrine"); *Casey*, 505 U.S. at 854-55 (examining "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539 (1985) (examining whether the precedent creates a "workable standard" from which the Court can judge future cases). All of these factors counsel in favor of reversal.

First, the decision is out of step with longstanding Fourteenth Amendment precedent. Stare decisis considerations are at their nadir "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940); *Adarand*, 515 U.S. at 231 (retaining such a case "would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete"). On this basis, the Court overturned its decision in *Metro Broadcasting*, which applied a lower level of scrutiny to federal racial classifications. *See Adarand*, 515 U.S. at 231-32 (explaining that "*Metro Broadcasting* undermined important principles of this Court's equal protection jurisprudence, established in a line of cases stretching back over 50 years . . . that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect

the personal right to equal protection of the laws"); *see also id.* at 235 ("[I]t follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling."). Recalling previous cases, the Court explained that *Metro Broadcasting* "lacked constitutional roots" and "was an abrupt and largely unexplained departure from precedent." *Id.* at 232-33 (citations and internal quotations omitted).

Like *Metro Broadcasting*, the Court's refusal to apply strict scrutiny in *Grutter* was a stark departure from established equal protection doctrine—including *Adarand*. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting) ("The Court . . . does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents."); *id.* at 379-80 (Rehnquist, C.J., dissenting) (explaining that before *Grutter*, the Court "consistently applied the same strict scrutiny analysis regardless of the government's purported reason for using race and regardless of the setting in which race was being used. . . . Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference."). The Court's implicit reinstatement of the deferential standard of *Metro Broadcasting* was without question "an abrupt and largely unexplained departure from precedent." *Adarand*, 515 U.S. at 233 (citation and internal quotations omitted).

In particular, the Court showed unprecedented deference to the University under the guise of First Amendment academic freedom. *See Grutter*, 539 U.S. at 328. Such deference is wildly out of step with the strict scrutiny the Court applied in *Croson* and *Adarand*. *See id.* at 350 (Thomas, J., concurring in part, dissenting in part) (explaining that the Constitution does not "countenance the unprecedented deference the Court gives to the Law School, an approach inconsistent with the very concept of 'strict scrutiny'"); *id.* at 387 (Rehnquist, C.J., dissenting)

("The Court, in an unprecedented display of deference under our strict scrutiny analysis, upholds the Law School's program despite its obvious flaws."); *id.* at 388-89 (Kennedy, J., dissenting) ("The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's . . . assurances that its admissions process meets with constitutional requirements."). This newly minted brand of unchecked deference to the wisdom of university admissions officials precludes meaningful judicial review. *See J.A. Croson Co.*, 488 U.S. at 493 ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

The deference the Court afforded to the University also is inconsistent with cases that have since been decided. *See Johnson v. California*, 543 U.S. 499 (2005). In *Johnson*, the Court overturned the Ninth Circuit's decision to uphold racial segregation in prisons under the "deferential standard of review articulated in *Turner v. Safley*, 482 U.S. 78 (1987)." *Id.* at 509. In the Court's view, "such deference is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified." *Id.* at 506 n.1. *Grutter* apparently stands for the curious—and ultimately unsustainable proposition—that when it comes to matters of race, the institutional judgments of university administrators are entitled to more deference from the Court than those of prison wardens. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (explaining that reversal is warranted where "changes have removed or weakened the conceptual underpinnings from the prior decision or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." (citations omitted)); *see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 560 (2003) ("*Bowers* causes uncertainty, for the precedents before *and after it* contradict its central holding." (emphasis added)).

Second, *Grutter*—a three-year old decision undermining an entire body of equal protection jurisprudence—did not create any reliance interests that warrant its retention despite its clearly wrong result. The Court has repeatedly concluded that recent precedents do not produce the type of reliance that the Court gave significant weight to in *Casey*. *See*, *e.g.*, *Adarand*, 515 U.S. at 233-34 ("[R]eliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event."). As Justice Scalia has explained, "[t]he freshness of error not only deprives it of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it." *Gathers*, 490 U.S. at 824 (Scalia, J., dissenting).

Indeed, racial preferences, by their nature, do not produce weighty reliance interests. Even if *Grutter* stands, no government institution is required by law to employ racial preferences. *See Bakke*, 438 U.S. at 379 (Brennan, J.) ("[A]ny State . . . is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."). Moreover, the entire purpose of these programs, according to their proponents, is to bring an end to racial classifications as quickly as possible. *See Grutter*, 539 U.S. at 342 ("The requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter . . ." (citations and internal quotations omitted)). There can be no reliance when the program at issue is not mandated by law and termination is certain.

Last, the decision did not produce a workable regime. *See Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) (explaining that a decision "should not be kept on the books in the name of stare decisis once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great").

The murky rationale of *Grutter* simply offers no guidance for future cases—nor could it. *See* Curt A. Levey, *Troubled Waters Ahead for Race-Based Admissions*, 9 Tex. Rev. L. & Pol. 63, 76-77 (2004) ("The difficulty of distinguishing the permissible from the prohibited has the potential to make the diversity rationale, as envisioned by the *Grutter* Court, unworkable in practice, thus hastening its demise."). The substantial discord *Grutter* has produced in the lower courts in only three years proves the point. *See* K.G. Jan Pillai, *The Defacing Reconstruction of Powellian Diversity*, 31 T. Marshall L. Rev. 1, 39 n.188 (2005) ("Justice O'Connor's use of 'diversity' as a cloak for remedial race-based policy has caused substantial confusion among the lower courts. Indeed, in the two years since *Grutter* became law, several courts have struggled to divine the conceptual differences between diversity and remediation.").

In truth, by confusing the distinction between racial balancing and diversity, *Grutter* forces the lower courts to look for imaginary distinctions in an effort to distinguish one unconstitutional program from another. *See* Charles Fried, Op.-Ed., *Courting Confusion*, N.Y. Times, Oct. 21, 2004 ("Swearing allegiance to Justice Powell's principles and delivering a lecture about the evil of quotas, [the Court] nonetheless endorsed the law school's transparent evasion of those principles, emphasizing the necessity of ensuring substantial minority representation not only in the classroom but also in industry, the military and public life—the very purposes he had denounced.").

Accordingly, if the unworkable *Gratz/Grutter* dichotomy is cemented as precedent, the unenviable task of distinguishing between "pluses" and "tiebreakers" is only the beginning. *See, e.g.*, *Petit v. City of Chicago*, 352 F.3d 1111, 1115 (7th Cir. 2003) ("[A]s did the University of Michigan, the Chicago Police Department had a compelling interest in diversity . . . to set the proper tone in the department and to earn the trust of the community, which in turn increases police effectiveness in protecting the city."); *Lomack v. City of Newark*, No. 04-6085,

2005 WL 2077479, at *7 (D.N.J. Aug. 25, 2005) (unpublished) (extending "diversity" rationale to firefighter assignments because "exposure to other firefighters of different backgrounds, vocabularies and cultures better prepares a firefighter to work effectively with his colleagues and to perform better on tests for promotional opportunities"). The "Court should not look forward to any of these cases." *Grutter*, 539 U.S. at 348-49 (Scalia, J., concurring in part, dissenting in part).

For purposes of stare decisis, the crucial question remains "whether a principle shall prevail over its later misapplications." *Helvering*, 309 U.S. at 122. *Grutter* upended a long-line of precedent applying strict scrutiny to racial classifications of any kind and therefore "undermines the fundamental principle of equal protection as a personal right. In this case, as between the principle and its later misapplications, the principle must prevail." *Adarand*, 515 U.S. at 235 (internal quotations omitted); *Payne*, 501 U.S. at 842-43 (Souter, J., concurring) ("[W]hen this Court has confronted a wrongly decided, unworkable precedent calling for some further action by the Court, we have chosen not to compound the original error, but to overrule the precedent.").

* * *

The Court should not wait twenty-two more years before putting an end to government-endorsed racial classifications. *See Grutter*, 539 U.S. at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also Bakke*, 438 U.S. at 403 (Blackmun, J.) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most."). More time is not the solution.

Instead, "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment Never to tolerate in one's own life or in the life or practices of one's government the differential treatment of other human beings

by race." *Price*, 604 P.2d at 1391 (Mosk, J., dissenting) (citation and internal quotations omitted). Moreover, as with *Metro Broadcasting*, retaining *Grutter* does not advance any institutional considerations. Quite the opposite, it irreparably damages the Court by "plac[ing] [its] *imprimatur* on a practice that can only weaken the principle of equality embodied in the Declaration of Independence and the Equal Protection Clause." *Grutter*, 539 U.S. at 378 (Thomas, J., concurring in part, dissenting in part).

The secondary school cases before the Court prove that waiting for *Grutter* to expire will not bring a satisfactory resolution. Far from it, emboldened by *Grutter*, public schools are aggressively imposing even more destructive quota systems with no end in sight. Indeed, by perpetuating quotas, such programs are both self-defeating in terms of reaching their stated goal and self-sustaining in terms of their purported necessity. Retaining this ill-advised decision is a damaging—and potentially irreversible—step backwards. *Grutter* is not settled law and should be overruled.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be reversed.

Respectfully submitted,

BERT W. REIN
Counsel of Record
WILLIAM S. CONSOVOY
THOMAS R. MCCARTHY
WILEY REIN & FIELDING LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Counsel for Amici Curiae

APPENDIX

APPENDIX

The law professors participating as *amici* are as follows:

Lloyd R. Cohen, Professor of Law, George Mason University School of Law

George W. Dent, Jr., Schott—van den Eynden Professor of Law, Case Western Reserve University School of Law

Leonard E. Gross, Professor of Law, Southern Illinois University School of Law

Robert H. Heidt, Professor of Law, Indiana University School of Law

Allison R. Hayward, Assistant Professor of Law, George Mason University School of Law

Mark R. Lee, Professor of Law, Southern Illinois University School of Law

Gregory E. Maggs, Professor of Law, The George Washington University School of Law

Geoffrey P. Miller, Stuyvesant P. Comfort Professor of Law, New York University School of Law

Stephen B. Presser, Raoul Berger Professor of Legal History, Northwestern University School of Law

Ronald J. Rychlak, Associate Dean for Academic Affairs and MDLA Professor of Law, University of Mississippi School of Law

Maimon Schwarzschild, Professor of Law, University of San Diego School of Law